

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

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FILE: B-216667

DATE: January 18, 1985

MATTER OF: Minority Enterprises, Inc.

DIGEST:

Where bid bond, required to be submitted by invitation for bids, does not designate a surety and only indications of identity of surety are an illegible signature and corporate seal, and accompanying documents do not clearly relate to this procurement, the agency properly determined the bond to be defective and the bid nonresponsive, because it is not clear that a surety intends to be bound.

Minority Enterprises, Inc. (MEI), protests the award of a contract to any one other than itself under invitation for bids (IFB) No. DACA31-84-B-0118, issued by the U.S. Army Corps of Engineers for removal of asbestos from the kitchen and the mechanical rooms at the Dewitt Army Community Hospital, Fort Belvoir, Virginia. MEI contends that the Corps improperly rejected its low bid on the basis that its bid bond was defective.

We deny the protest.

The IFB required each bidder to submit with its bid a bid bond (Standard Form 24) in the amount of 20 percent of its total bid price or \$3 million, whichever was less. The bid bond penalty amount could be expressed either in dollars and cents or as a percentage of the total bid price.

The Corps received four bids, one of which was withdrawn due to a mistake in bid. MEI's bid was the lowest of the remaining bids. Its bid was accompanied by a bid bond which at the top of the form identified MEI as the principal, but the space provided immediately below that for the name and business address of the surety(ies)

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was left blank. The bond indicated that the penal amount was 20 percent of the bid price and was not to exceed \$100,000. The bond was signed on behalf of the principal by David Giuliani, who was identified as "President." The space for the signature of individual sureties was left blank. In the space for the signature of corporate surety there was a signature, but it was illegible and the spaces provided for name and address, state of incorporation, liability limit, and typed name and title of the person signing were all left blank. In the adjoining space for a corporate seal there was a barely raised impression which was also illegible. Attached to MEI's bid bond was a Union Indemnity Insurance Company of New York (Union) power of attorney form, appointing several individuals as attorney(s)-in-fact with the authority to sign bonds not exceeding \$600,000 on behalf of Union, and a financial statement of Union. The power of attorney form, a photocopy, included a space in the upper right corner for designating a bond number, but there was no number provided and, according to the agency, it appeared that a number had been deleted, perhaps by correction fluid, from that space.

The Corps determined that the bid bond was defective because there was insufficient evidence on the face of the bond to conclude with certainty that the surety intended to be bound for 20 percent of MEI's bid price as required by the solicitation's bid bond provisions. The Corps therefore rejected MEI's bid as nonresponsive.

MEI contends that, despite its failure to include the name of Union as its surety on the bid bond form, Union would in fact be liable on the bond as written since it was the manifest intent of the surety to be bound. In support of this contention, the protester asserts that the bond submitted was executed by Robert A. Nicosia on behalf of Union and, although Union's name did not appear on the bid bond form, the attached power of attorney form and financial statement were from Union and, therefore, the name of the surety should have been obvious. It asserts that the failure to include the name of the surety on the form is a minor informality.

MEI also contends that under a previous solicitation, IFB No. DACA31-84-B-0096, the Corps accepted a bond with a similar deficiency after obtaining information from the surety and, therefore, should do similarly here. MEI offers a letter from its bonding company which confirms that Union was erroneously omitted as MEI's surety and coverage with Union was effective as of the bid date.

When required by the IFB, a bid bond is a material part of a bid and, therefore, must be furnished with the bid. Baucom Janitorial Service, Inc., B-206353, Apr. 19, 1982, 82-1 C.P.D. ¶ 356. To view the bid bond requirement otherwise, so as to permit waiver of a bid bond requirement or of a failure to furnish a proper bid bond, would make it possible for a bidder to decide after opening whether or not to have its bid rejected, cause undue delay in effecting procurements, and create, through the subjective determinations by different contracting officers of whether waiver is appropriate, inconsistencies in the treatment of bidders. See Edw. Kocharian & Company, Inc.--request for modification, 58 Comp. Gen. 516 (1979), 79-1 C.P.D. ¶ 326. When a bidder supplies a defective bond, the bid itself is rendered defective and must be rejected as nonresponsive. Atlas Contractors, Inc., B-209446, Mar. 24, 1983, 83-1 C.P.D. ¶ 303, reversed on other grounds sub nom. Hancon Associates--Request for Reconsideration, B-209446.2, Apr. 29, 1983, 83-1 C.P.D. ¶ 460. The determinative question as to the acceptability of a bid bond is whether the bidding documents establish that the bond could be enforced if the bidder did not execute the contract. A.D. Roe Company, Inc., 54 Comp. Gen. 271 (1974), 74-2 C.P.D. ¶ 194.

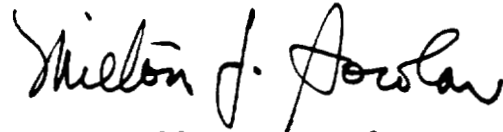
In this case, reading all of the bid documents together, we believe the bid bond did not sufficiently indicate the intent of the surety to be bound by its terms. The spaces provided for designating a surety on the bid bond were left blank and the only indications of the identity of the surety were the illegible signature of a corporate surety and the illegible corporate seal. The bid bond itself therefore did not identify the surety. Although a Union power of attorney form was attached to the bid, nowhere on the power of attorney form is there a reference to the particular procurement in question here.

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Rather, the power of attorney is a blank conferral of agency on the persons designated. We cannot conclude that the attachment of this form would result in the company being bound under the bond, in the absence of any evidence on the face of the bond which shows that Union intended to act as surety for the bid. See Baker-Roberts, Inc., B-213148, Feb. 14, 1984, 84-1 C.P.D. ¶ 195. Furthermore, there is no indication that the attached financial statement relates to this procurement. Under these circumstances, the agency properly rejected the protester's bid on the basis of an inadequate bid bond.

Although MEI submitted a letter from its bonding company affirming Union's intent to act as surety for the bid, this letter, coming as it did after bid opening, cannot be considered in determining whether the bond as submitted is responsive to the solicitation. See Emerald Electric, B-212460, Oct. 26, 1983, 83-2 C.P.D. ¶ 505. It is a well-settled rule that a nonresponsive bid cannot be made responsive after bid opening through a change or explanation of what was intended. Baucom Janitorial Service, Inc., supra.

Finally, the Corps is not estopped by its admitted prior erroneous actions from rejecting MEI's instant bid as nonresponsive. Emerald Electric, supra. The bid bond requirements have the force and effect of law and the Corps is legally bound to reject MEI's bid as nonresponsive.



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